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Supreme Court, U.S.
FILED
DEC 23 1993
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No. 93-6186

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

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DEC 22 1993
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SUPREME COURT, U.S.

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The petition in this case presents two questions: (1) whether a federal court may require a state prisoner to exhaust state habeas corpus remedies before litigating a 42 U.S.C. § 1983 claim for money damages and, (2) if so, whether the court should dismiss, rather than stay, the Section 1983 claim pending exhaustion. Respondents acknowledge (as did the Seventh Circuit below) that the courts of appeals are in conflict on the second of these questions. As for the first, respondents' arguments against review are premised on a misreading both of this Court's decisions and of a holding of the Second Circuit that squarely conflicts with the decision below. Indeed, the Court recently granted review in a

similar case raising a question about the relationship between Section 1983 and state habeas corpus, but was forced to dismiss the writ as improvidently granted because of impending mootness. In these circumstances, further review plainly is warranted.

1. At the outset, respondents are wrong in arguing (Br. in Opp. 8-9) that review should be denied because principles of issue preclusion would prevent petitioner from prevailing on the merits of his Section 1983 claim. Needless to say, this argument puts the cart before the horse: the questions now before the Court go only to whether petitioner is entitled to have his claim heard at all. Speculation about the possible outcome on the merits if petitioner is permitted to proceed does not justify a refusal to review a decision that bars petitioner from the courthouse altogether.

In any event, the factual and legal premises of respondents' contention are incorrect. Petitioner has not, as respondents assert, "twice litigated the allegations contained in his section 1983 action." Br. in Opp. 8. In fact, several of the claims advanced in petitioner's Section 1983 suit -- for example, that respondents destroyed exculpatory evidence -- were neither advanced nor resolved either on direct appeal or in petitioner's federal habeas action. Compare Pet. App. 12a-16a (addressing petitioner's claims on direct appeal) and App., infra, 1a-6a (petitioner's habeas corpus petition) with Pet. App. 21a-23a (Section 1983 complaint). And principles of issue preclusion recognized by the Indiana courts bar the litigation only of those question that were actually adjudicated in a prior proceeding. See Sullivan v.

American Casualty Co., 605 N.E.2d 134, 137 (Ind. 1992) (emphasis added) ("collateral estoppel operates to bar subsequent relitigation of the same fact or issue where that issue was necessarily adjudicated in a former suit and the same fact or issue is presented in a subsequent lawsuit"). See generally Hazard & James, Civil Procedure § 11.16-11.17 (1985).1/ The assertion of petitioner's claims therefore will not be barred by the doctrine of issue preclusion.

2. Respondents' arguments against review of the second question presented in the petition are remarkably unenthusiastic. Respondents do not deny that there is a conflict in the circuits on the issue. They do not deny that the question is a recurring and important one. And they do not deny that the issue warrants the Court's consideration whether or not the Court grants review of the first question presented in the petition.

Instead, respondents suggest that the conflict in the courts of appeals is too "fresh[]" to warrant review. Br. in Opp. 18. That argument is insubstantial. On the one hand, 10 circuits have now addressed the question whether a Section 1983 action should be stayed or dismissed pending exhaustion (see Pet. 26-27), so that

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1/ In mistakenly asserting that a court adjudicating petitioner's Section 1983 action "would accord preclusive effect to those issues that petitioner had the opportunity to litigate" (Br. in Opp. 8 (emphasis added)), respondents evidently confuse the requirement of actual adjudication with the additional requirement that "the party against whom the prior judgment is pled had a full and fair opportunity to litigate the issue." Sullivan, 605 N.E.2d at 138. Collateral estoppel does not apply when an issue was not decided in the prior case, whether or not one of the parties could have litigated it. See generally id. at 137-138.

there hardly is a need for further percolation among the lower courts; on the other, there is no prospect that the Seventh Circuit -- which refused (over three dissenting votes) to grant rehearing en banc -- will change its view. The issue therefore plainly is ripe for this Court's consideration. Respondents are similarly misguided in proposing (Br. in Opp. 18) that, because Congress has "recently" addressed exhaustion requirements for prisoner Section 1983 lawsuits, the problems posed by the decision below should be left for congressional correction. In fact, Congress last legislated in this area almost 15 years ago with the enactment of CRIPA (see Pet. 23). And it is, of course, the responsibility of this Court, rather than of Congress, to resolve conflicts among the courts of appeals.

Respondents also are incorrect in asserting (Br. in Opp. 18) that for "prisoners who exhaust diligently" there is "little, if any, practical difference" between the Seventh Circuit's rule and the approach taken by other courts of appeals. As Judge Kozinski has explained for the Ninth Circuit, "[e]xhaustion of state remedies is a process that may take years to complete; it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim." Young v. Kenney, 907 F.2d 874, 878 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991). This means, as we explained in the petition (at 30, 32-34), that under the Seventh Circuit's rule even prisoners who proceed diligently and in good faith sometimes will find their claims time-barred -- and will, at a minimum, be

subjected to a wasteful and burdensome round of procedural litigation that is not required by other courts of appeals.2/ Respondents have no response to this point.3/

Finally, respondents are wrong in contending (Br. in Opp. 19) that the decision below does not conflict with Deakins v. Monaghan, 484 U.S. 193 (1988). For present purposes, it is enough to note that three other courts of appeals have held that the rationale of Deakins applies in the circumstances of this case. See Pet. 35. Respondents do not deny that the Seventh Circuit's holding is irreconcilable with those decisions.

3. In opposing review of the first question presented in the petition, respondents contend principally that Preiser v. Rodriguez, 411 U.S. 475 (1973), Wolff v. McDonnell, 418 U.S. 539 (1974), and Gerstein v. Pugh, 420 U.S. 103 (1975), require

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2/ That surely will be the case in this suit. As respondents note (Br. in Opp. 5-6), petitioner has now been deemed to have exhausted his state post-conviction remedies and has initiated a second Section 1983 action, which he will attempt to prosecute if this action is held to have been properly dismissed rather than stayed. But if this Court denies review (thus terminating petitioner's first Section 1983 action), the second Section 1983 suit undoubtedly will be met by a statute of limitations defense. Indeed, respondents pointedly do not suggest that they will refrain from arguing the statute of limitations as a bar to the second suit.

3/ Respondents do deny (Br. in Opp. 19) that use of the Seventh Circuit's elaborate equitable estoppel analysis will consume more resources than a consideration of the merits of prisoner suits. This Court itself has noted, however, that "[o]ur experience teaches us that the vast majority of prisoner cases are resolved on the complaint alone. Of those prisoners whose complaints survive initial dismissal, few attempt discovery and fewer still actually obtain it." Cleavinger v. Saxner, 474 U.S. 193, 208 (1985). In contrast, the Seventh Circuit's approach will require in every case an analysis of state equitable tolling law and then a fact-specific inquiry into the circumstances of the suit. See Pet. 33.

exhaustion of state post-conviction remedies prior to the commencement of a Section 1983 action that -- as assertedly is the case here -- "attacks the legality of [the prisoner's] conviction." Br. in Opp. 12. See id. at 10-13. But this assertion is premised on a misreading of the cases. In holding that a prisoner must exhaust state remedies before bringing a Section 1983 action challenging the validity of his conviction, the Court in Preiser plainly had in mind only challenges that sought release as a remedy. The Court said so expressly: it explained that "[i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release -- the traditional purpose of habeas corpus." Preiser, 411 U.S. at 494 (emphasis added). And the Court made clear repeatedly that "the core of habeas corpus" involves a challenge to "the very duration of * * * physical confinement itself." Id. at 487-488.4/ The Preiser Court thus expressly contemplated that a prisoner who seeks damages for unconstitutional action that led to his conviction need not exhaust state remedies.

4/ See, e.g., 411 U.S. at 488 n.8 (habeas corpus is intended "to deal with such attacks on physical custody"); id. at 489 (emphasis added) (habeas corpus addresses the "validity of [the prisoner's] confinement," the "fact or duration of his confinement," and "goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from further confinement or the shortening of its duration"); id. at 500 ("We hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus").

Indeed, the distinction advanced by respondents -- which would bar a Section 1983 action that somehow raises doubts about the validity of the plaintiff's conviction, while allowing other constitutional challenges to proceed -- makes sense only if a judgment for the plaintiff in a Section 1983 damages action could have a res judicata or collateral estoppel effect in a subsequent habeas action seeking release. But that is not the case. As we explained in the petition (at 24-25), a judgment against state officials in their individual capacities for money damages cannot be used to estop the state in a subsequent habeas action seeking release. Respondents do not deny this point, and offer no other justification for their strained reading of Preiser.5/

For similar reasons, respondents are incorrect in asserting (Br. in Opp. 14-15) that the decision below does not conflict with Mack v. Varelas, 835 F.2d 995 (2d Cir. 1987). Mack was a Section 1983 action involving a Sixth Amendment claim for money damages that was premised on the defendant sheriff's failure to produce a trial witness. While respondents assert that the Second Circuit found that the prisoner in Mack "was not attacking the validity of his conviction" (Br. in Opp. 15), that is true only in the sense

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5/ The invalidity of respondents' distinction is confirmed by the Court's decision in Gerstein. As respondents themselves note (Br. in Opp. 12), that case involved a claim by pre-trial detainees that their detention without a probable cause hearing violated the Fourth Amendment. Although this contention obviously called into question the legality of the detainees' confinement -- just as respondents assert petitioner's claim in this case calls into question the validity of his conviction -- the Court held that the detainees' Section 1983 claim could proceed "[b]ecause release was neither asked nor ordered." Gerstein, 420 U.S. at 107 n.6.

that the prisoner did not seek release. In fact, his complaint asserted that the failure to produce the witness "'caus[ed] [him] to be convicted and incarcerated,'" and he therefore demanded "damages for each day of his ordered confinement." Mack, 835 F.2d at 998. This case, in which petitioner seeks damages for destruction of exculpatory evidence, is essentially identical.6/

Finally, respondents assert (Br. in Opp. 13-14) that, as recently as this Term, the Court has denied petitions for certiorari raising the first issue presented here. In fact, in Cavanaugh v. Roller, No. 92-1510, the Court recently granted a petition presenting a very similar issue; the Court was forced to dismiss the writ as improvidently granted, however, because events occurring after the grant of certiorari promised to render the case moot. See generally Cavanaugh v Roller, No. 92-1510, oral arg. tr. 3-8; Cavanaugh v. Roller, No. 92-1510 (Nov. 30, 1993) (dismissing cert. as improvidently granted).7/

Cavanaugh involved a prisoner's Section 1983 challenge to South Carolina's parole release system; the first question presented in the petition was whether the suit could proceed under Section 1983 or whether the prisoner's claim "reached the very 'core of habeas corpus' and, as such, required the petitioner to exhaust his remedies in the state courts of South Carolina before proceeding to the federal courts." Cavanaugh v. Roller, No. 92-1510, Pet. 1. The Court's decision to grant review in Cavanaugh presumably reflects a recognition that additional guidance is needed on the question, as the petition in that case put it, "[h]ow to sort through the frustrating conflict between the civil rights and habeas corpus remedies for state prisoners." Pet. 21. The

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6/ Respondents claim that here, in contrast with Mack, the essence of the "claim for damages is that the conviction was wrongful." Br. in Opp. 15. But the cases are not distinguishable on that ground: the argument in Mack, as we note above, was that the wrongful failure to produce a witness caused the prisoner's conviction and incarceration. Respondents also complain that the measure of petitioner's requested damages is "designed to compensate him for lost income cause[d] by his allegedly improper confinement." Ibid. But that contention, even if true (in fact, petitioner seeks both lost income and compensation for the violation of his constitutional rights, see Pet. App. 25a), hardly serves to distinguish Mack, where the plaintiff sought compensation for every day of past and prospective confinement. See 835 F.2d at 997, 998. Finally, respondents are incorrect in asserting (Br. in Opp. 15-16 n.9) that the Second Circuit's extensive discussion of exhaustion in Mack was dictum. To the contrary, the court's holding in Mack that "[t]reatment of the complaint as a petition for habeas corpus was * * * not proper" was the essential foundation for its further conclusion that "the case should not have been dismissed for lack of exhaustion." Id. at 999.

7/ In contending that the Court recently denied review of the issue presented here, respondents have in mind Tedford v. Hepting, cert. denied, 114 S. Ct. 317 (1993). See Br. in Opp. 13 n.7. That case, however, differed in crucial respects from this one. In Tedford, the prisoner brought a Section 1983 action claiming that the transcripts of his trial had been improperly altered, adversely affecting his prospects on appeal. He sought not only damages, but also injunctive relief in the form of an order correcting the trial record. See Tedford v. Hepting, 990 F.2d 745, 746, 747 (3d Cir. 1993). When his claim was dismissed, he sought certiorari. He acknowledged in his petition to this Court, however, that the modified records would be used to challenge his conviction and that "'[t]he conclusion is inescapable that plaintiff seeks to use this action as a device to secure his release from confinement.'" Pet. 16 (citation omitted). In contrast, as we have explained -- and as respondents nowhere deny -- the Section 1983 action in this case cannot have even collateral effects on petitioner's continued confinement. The decision below therefore is in direct conflict with Preiser, Wolff, Gerstein, and Mack; the decision in Tedford was not.

Court's inability to render a decision in Cavanaugh makes the need for review in this case especially pressing.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 1993

APPENDIX

FILED
JAN 22 1991
RICHARD E. TIMMONS, CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

S91-00040

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District Northern	
Roy Heck, Sr.	Prisoner No. 874376	Docket No.

Place of Confinement: Westville Correctional Center
P.O. Box 473/dorm. O-1
Westville, Indiana 46391-0473

Name of Petitioner (include name upon which convicted): Roy Heck, Sr.

Name of Respondent (authorized person having custody of petitioner): v. Thomas D. Richards

Attorney General of the State of: Indiana-Linley E. Pearson

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Dearborn Circuit Court, Lawrenceburg, Indiana

2. Date of judgment of conviction: July 30th, 1987

3. Length of sentence: Fifteen Years

4. Nature of offense involved (all counts): Murder-found guilty of Voluntary Manslaughter

5. What was your plea? (Check one)
(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
N/A

6. Kind of trial: (Check one)
(a) Jury ☒
(b) Judge only ☐

7. Did you testify at the trial?
Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: Indiana Supreme Court

(b) Result: Affirmed

(c) Date of result: April 6th, 1990

(d) Grounds raised: 1. Insufficient evidence) 2. Conviction was contrary to law in pre-trial voice identification being impermissability suggestive. 3.) Judgement was contrary to law dur to prejudicial irrevelent hearsay testimony of state's witnesses.) 4.) The court errored in allowing rebuttal testimony of Roberta Heck) 5.) The court abused its descretion in allowing testimony of states rebuttal witnesses after being on notice of the seperation order being violated.) 6) The court errored in allowing testimony of officer Kreimop regarding his actions after over hearing a telephone conversation of the defendant.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Northern District Court under cause S90-305

(2) Nature of proceeding: Petition for writ of habeas corpus 28 U.S.C. 2254

(3) Grounds raised: same as listed herein with the exception of ground (3) which was removed due to being unexhausted

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result: Dismissed without prejudice

(6) Date of result: January 7th, 1991

(b) As to any second petition, application or motion give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result N/A

(6) Date of result N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result N/A

(6) Date of result N/A

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐ N/A

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not

N/A

5. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Conviction was obtained without evidence sufficient to support a conviction of Voluntary Manslaughter.

Supporting FACTS (tell your story *briefly* without citing cases or law): The evidence presented failed to establish petitioner inflicted any injury which may have caused the decedent's death or any action which could be considered as a deliberit intent to do so: Further, the cause of death was not established; The petitioner does not feel that a blow hard enough to fracture a jaw would cause death to any person, which would not make this an adequate cause of death.

B. Ground two: Conviction was obtained by illegal over suggestive voice identification.

Supporting FACTS (tell your story *briefly* without citing cases or law): State's witness, Tessie Standriff, (18) months after the alleged incident, and one (1) week prior to petitioner's trial, requested to hear a tape recording of petitioner's voice; Authorities provided such with the petitioner. During petitioner's trial Standriff identified his voice on a tape recording, and testified that authorities told her it was the petitioner's voice prior to her listening to the tape. As reference, see attached exhibit A

C. Ground three: In abusing its discretion, the trial court violated petitioner's right to a fair trial.

Supporting FACTS (tell your story *briefly* without citing cases or law): The monumental amount of hearsay testimony was labled as " state of mind " of either the petitioner or the decedent, all of which acted to prejudice the jury and amounted to a probability that the petitioner is the one who took the decedent's life.

D. Ground four Evidence was illegally obtained, used and presented to the jury.

Supporting FACTS (tell your story *briefly* without citing cases or law): Police officer Michael Kreinhop, was allowed to testify in depth concerning his actions after " eavesdropping " on petitioner's telephone call from the Dearborn County Jail, which was suppose to be a private phone. This testimony was highly prejudicial to the petitioner before the jury.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing Joseph Votaw III. 230 west High St. Lawrenceburg, In. 47205 (812) 537-4500

(b) At arraignment and plea " same as above "

(c) At trial Joseph Votaw III. and John Darnette

(d) At sentencing Joseph Votaw III. and John Darnette

(e) On appeal Kathleen A Dayson 6050 East 10th St. Indianapolis, In 46219 (317) 352-1251

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: August 18th, 1987 sentenced to an executed term of fifteen (15) years

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

Jan. 14, 1991
(date)

Roy Heck Sr.
Signature of Petitioner